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BEFORE THE

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# Federal Communications Commission

WASHINGTON, D.C.

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OCT 31 1994

FEDERAL COMMUNICATIONS COMMISSION  
SECRETARY

In re Applications of )

MM Docket No. 94-10 )

THE LUTHERAN CHURCH/  
MISSOURI SYNOD )

FCC File Nos. BR-890929VC  
BRH-890929VB )

For Renewal of Licenses of )  
Stations KFUD/KFUD-FM )  
Clayton, Missouri )

To: The Honorable Arthur I. Steinberg  
Administrative Law Judge

REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW  
OF THE LUTHERAN CHURCH-MISSOURI SYNOD

THE LUTHERAN CHURCH-MISSOURI  
SYNOD

Richard R. Zaragoza  
Kathryn R. Schmeltzer  
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To: The Honorable Arthur I. Steinberg  
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**REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW**  
**OF THE LUTHERAN CHURCH-MISSOURI SYNOD**

The Lutheran Church-Missouri Synod (the "Church"), licensee of KFUD(AM) and KFUD-FM, Clayton, Missouri (collectively, "KFUD"), by its attorneys and pursuant to Sections 1.263 and 1.264 of the Commission's Rules, hereby submits its Reply to the Proposed Findings of Fact and Conclusions of Law filed by the Mass Media Bureau (the "Bureau") and to the Findings of Fact and Conclusions of Law filed by the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP (collectively, the "NAACP").<sup>1/</sup>

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<sup>1/</sup> As requested by the Presiding Judge, the Church has sought to limit itself in this Reply to responding to the major points raised by the Bureau and NAACP rather than  
(continued...)

## I. OVERVIEW

1. In the Church's "Proposed Findings of Fact and Conclusions of Law," the Church discussed the constant expansion of the Commission's EEO requirements during and after the License Term<sup>2/</sup> of KFUD (AM) and KFUD-FM, and the inappropriateness of judging EEO efforts by standards not adopted until after the time in question. Church's Proposed Findings of Fact and Conclusions of Law at 92-103 [hereinafter "Church's Findings and Conclusions"]. In particular, the Church argued that the heightened EEO requirements and greatly increased penalties adopted in the Commission's recently-released Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929 (1994) ("EEO Policy Statement"), cannot be applied retroactively to the Church. Church's Findings and Conclusions at 92-95. The Church also noted that regardless of the impropriety inherent in the retroactive application of the EEO Policy Statement to KFUD, the EEO Policy Statement was adopted in violation of the Administrative Procedure Act and therefore is of no legal force. Church's Findings and Conclusions at 96-98. The

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<sup>1/</sup> (...continued)

summarizing the facts and arguments found in the Church's "Proposed Findings of Fact and Conclusions of Law." This being the case, the Church's "Proposed Findings of Fact and Conclusions of Law" remain the central statement of the Church's position and matters not addressed in this Reply have been, the Church believes, adequately addressed in that original filing.

<sup>2/</sup> As used herein, "License Term" means the period between February 1, 1983 and February 1, 1990.



Church thus argued that the appropriate standard by which to judge KFUD's 1983-1990 EEO efforts is the Commission's EEO case precedent covering that time period. Church's Findings and Conclusions at 101-11.

2. Since the filing of the Church's Findings and Conclusions, the Commission has removed the burden of deciding that question from the Presiding Judge's shoulders. In a recent EEO decision from the Commission, Golden Empire Broadcasting Co., FCC 94-248 (released October 12, 1994), the Commission declined to utilize the method of analysis or the sanctions set forth in the EEO Policy Statement, apparently recognizing that the EEO Policy Statement is indeed defective.

3. Equally interesting is the Commission's treatment of the licensee in Golden Empire Broadcasting Company, who, like KFUD, provided information at the time it filed its Opposition to a petition to deny<sup>3/</sup> indicating that its renewal application had understated the number of total hires. Id. at 5. However, unlike KFUD, where the difference (zero minorities out of ten hires versus zero minorities out of six hires) did not affect the percentage of minorities hired during that twelve month period, the understatement made in Golden Empire Broadcasting Company (one minority out of eight hires versus one minority out of nine hires) enhanced the station's EEO profile by making it appear

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<sup>3/</sup> The petition to deny had been filed by the California State Conference of Branches of the NAACP and the League of United Latin American Citizens regarding the station's EEO practices. Golden Empire Broadcasting Co. at 1.

that the station had hired at above parity with its local minority labor force when it had not. Despite this fact, the Commission did not even ask the licensee to explain the discrepancy, and mentioned the altered number of hires only in passing in a footnote to its decision. See id. at 5 n.6. The Commission neither suggested that a misrepresentation might have occurred, nor admonished the licensee for its error in filing an incorrect renewal application.

4. The analysis utilized in Golden Empire Broadcasting Company, as well as the numerous cases discussed in the Church's Findings and Conclusions at 107-11, make clear that the Bureau seriously erred in failing to recommend that KFUE's licenses be renewed. Equally clear is that the Bureau has lost all sense of perspective in suggesting that possible licensee shortcomings that normally merit minor sanctions or only a passing mention are in the present case so overwhelming as to outweigh 70 years of impeccable rule compliance and strong public service.

5. The Bureau's position is in fact so startling that the Church increasingly fears that the Commission is seeking a sacrificial licensee to demonstrate its "seriousness" towards EEO matters. The Bureau's position in this proceeding appears to indicate that the Commission is unwilling to wait to find a licensee deserving of such a sanction, and has instead found the Church to be a convenient, if undeserving, target. While the Church appreciates the need for the Commission to send clear

signals of its expectations to licensees,<sup>4/</sup> denying renewal of KFUD's licenses would be akin to a government executing parking violators to demonstrate its seriousness regarding drunk driving. It cannot be justified as a matter of law, and the only signal it would send to other licensees is that a long record of exceptional service to the public is meaningless if a licensee has the misfortune to be in the wrong place at the wrong time when the Commission decides it wants to make a "statement."

6. With regard to the specific matters raised by the Bureau in its "Proposed Findings of Fact and Conclusions of Law" [hereinafter "Bureau's Findings and Conclusions"], the Church has relatively few quarrels with the Bureau's proposed recitations of fact. With a few exceptions,<sup>5/</sup> they are generally accurate,

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<sup>4/</sup> The Church's understanding of the need for clear signals from the Commission regarding regulatory expectations is based largely on the fact that the Commission's prior failure to give such signals with regard to the EEO programs of religious licensees has placed the Church in its present unwelcome position. See Church's Findings and Conclusions at 89-90.

<sup>5/</sup> Among the errors are the Bureau's statement that the Church did not "specifically recruit" for minority employees until "near the end of the License Term." Bureau's Findings and Conclusions at 14. This ignores, to cite only one example, the Church's use of a network of congregations and Lutherans in the community through which KFUD's Coordinator of Worship Programming, Lula Daniels, was able to identify African-Americans who were qualified for positions at KFUD and to alert people looking for positions to apply at KFUD. Tr. 865; Church Ex. 4, Att. 6, at 1; Church Ex. 7 at 9; Tr. 746-49, 864-65. This referral network resulted in the hires of at least two African-American employees, Ruth Clerkly and Helen Richardson. Church Ex. 4 at 6; Church Ex. 4, Att. 6, at 1. It should be noted that referrals from station employees are specifically listed as an example of a  
(continued...)

though not nearly as complete as the Church's proposed findings. The Church, however, fundamentally disagrees with most of the conclusions that the Bureau has attempted to draw from those findings.

7. The only way the Bureau can reach the conclusions it has proposed is by disregarding its own proposed factual findings, ignoring the Commission's existing body of precedent, overlooking the First Amendment to the Constitution of the United States of America, and inventing a duty on the part of licensees to submit information that is neither requested nor particularly

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<sup>5/</sup> (...continued)

referral source in the Commission's EEO rule. 47 C.F.R. § 73.2080(c)(2)(iv). The Bureau is therefore incorrect to argue in its Findings and Conclusions at page 51 that the Church did not use any of the recruitment sources listed as examples in that rule. Another error in the Bureau's recitation of the facts is its claim that KFUE's employment application stated "until April 26, 1989," that there was a preference for members of Church congregations. See Bureau's Findings and Conclusions at 46. In fact, this statement was not in the application form used prior to 1986 or 1987 (see, e.g., NAACP Ex. 31 at 4) or the application form used after April 26, 1989. Tr. 184.

The Bureau also states that the hiring of Caridad Perez was some sort of "ad hoc 'fix'" (see Bureau's Findings and Conclusions at 51), which is nothing more than a cheap shot with no evidentiary support, and which is contradicted by the record. Church Ex. 4 at 12; see also Tr. 763. Finally, the Bureau's claim that Thomas Lauher had "apparently" not seen a copy of KFUE's EEO program prior to receiving it from communications counsel in December 1989 (see Bureau's Findings and Conclusions at 52) lacks any evidentiary support. There is no evidence concerning the reasons Mr. Lauher asked for a new copy from counsel. On this record, Mr. Lauher may well have seen the program before and asked counsel for it, for example, to make certain that he had the most recent version. The Bureau engages in mere speculation when it argues that Mr. Lauher had not seen the program before.

relevant, while, at the same time, ignoring the government's well-established obligation to provide proper notice of the information it expects from regulatees. Compounding the weakness of the Bureau's position is the Commission's repeated refusal, for over twenty years, to provide EEO guidelines for religious licensees or to react to the changing state of the law in that regard. See Church's Findings and Conclusions at 89-90. Because the Bureau failed to address any of these fundamental issues, its conclusions are fatally flawed and of little use in resolving the designated issues in this case.

8. Worse, unburdened either by the weight of reason or the gravity of its actions, the Bureau has leaped without hesitation for the draconian sanction of non-renewal. Such a sanction would be contrary to all precedents in which the Commission has considered even remotely similar factual records. The recommendation of such a completely inappropriate sanction once again demonstrates the inexplicably goal-oriented approach with which the Commission has handled this proceeding at every stage.

9. The apparent inspiration for the Bureau's mysterious obsession with making an "example" of the Church regardless of the Church's innocence of any wrongdoing is not hard to find. The NAACP is obviously pushing hard to obtain such a "statement" from the Commission and has found this proceeding to be a convenient forum for procuring it. In order to accomplish this goal, the NAACP has accused a mainstream national church with a membership of 2.6 million persons (including 50,000 African-

Americans), of being a racist and a liar. See Church Ex. 2 at 1 (statistics concerning Church membership).

10. Like the Bureau's conclusions, the NAACP's conclusions are goal-oriented without a particular concern for the actual merits of the case. The NAACP has, however, gone one step further than the Bureau. Unlike the Bureau, which presented adverse conclusions that were unsupported by its own findings of fact, the NAACP has gone the extra step of proposing facts that are nowhere in the record, and then based its conclusions on those purported "facts." For example, the NAACP alleges that the Church "affirmatively discriminated" despite the fact that there is not a scintilla of record evidence demonstrating intentional or affirmative discrimination of any sort.

11. The NAACP's entire "affirmative discrimination" case is built upon speculation and inferences, and an argument that "[i]ntent to discriminate is frequently inferred in civil rights cases." NAACP's Findings of Fact and Conclusions of Law at 133 [hereinafter "NAACP's Findings and Conclusions"]. Even if this were a civil rights case rather than a licensing proceeding, such an inference would still have to be grounded in fact, not speculation. The NAACP has, however, been unable to locate and present any such facts in the record of this proceeding. While inferences based on speculation may have their place in tabloid journalism, they have no probative value in this or any other legal proceeding.

12. Even disregarding the, at best, tenuous connection between the NAACP's proposed findings of fact and the facts of this case, the NAACP's findings are unusable as they are not findings of fact at all -- they are mostly arguments and conjecture. The NAACP has, in effect, merely filed two sets of conclusions, neither of which is premised on the facts in the record. Both sets of conclusions are premised on negative inferences built upon negative inferences which are themselves based on partial facts and facts taken out of context. As such, they are not just useless, they are harmfully deceptive.

13. The NAACP claims that "KFUO engaged in a massive pattern of disqualifying misrepresentations" (NAACP's Findings and Conclusions at 145), yet presents no evidence of an intent to deceive, and in fact concedes that the Church's witnesses were credible and exhibited good demeanor. Id. at 152 ("[T]hey comported themselves decently on the stand."). Given the tedious, repetitive, and absurd nature of these allegations (as opposed to factually-supported conclusions), the Church has chosen to address herein only the central issues raised by the NAACP's Findings and Conclusions and has responded to the individual allegations, particularly the NAACP's 71 purported "misrepresentations," in a separate Appendix A to this document.

14. Despite the NAACP's obvious desire to obtain a civil rights "statement" from the Commission in this proceeding, this is clearly not a civil rights case. The only statement that would be derived from the non-renewal of KFUO's licenses is that

the Government may arbitrarily deny the due process rights inherent in a fair judgment on the merits where it is politically expedient. That it is permissible for the Government to sacrifice the rights of one organization to fair treatment in order to appease another organization is not only a vile notion, but it is one that the NAACP, upon reflection, cannot possibly support. If this is, as the NAACP contends, a civil rights case, it is not because any minority has been treated unfairly by the Church, but because the rights of the Church and its individual members to a judgment on the merits in accord with due process, as well as their Freedom of Religion, will have to be crushed in order to reach the result that the NAACP, and apparently the Bureau, has in mind. The Presiding Judge should not allow this to happen.

## II. KFUO DID NOT DISCRIMINATE

15. The Church's position throughout this proceeding has been that it did not unlawfully discriminate. Neither the Bureau nor the NAACP has shown any evidence of overt or intentional discrimination at KFUE, and there was no evidence that anyone was ever denied employment or discouraged from applying because of their race.<sup>6/</sup> There was not even a single complaint made,

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<sup>6/</sup> For this reason, the NAACP's citation to Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956), as being an analogous case is nonsense. See NAACP's Findings and Conclusions at 153. Fitzgerald involved airline passengers who were denied boarding because of their race.  
(continued...)



unsupported or not, of such discrimination during the entire License Term. Church Ex. 7 at 10. Recognizing the incontrovertible state of the record as to this issue, the Bureau has correctly concluded that there was no discrimination and that the Section 73.2080(a) issue must be resolved in favor of the Church. Bureau's Findings and Conclusions at 46.

16. The NAACP, apparently acknowledging as did the Bureau that no evidence of discrimination was discovered during the hearing, has attempted to keep the issue alive through some sort of theory of "circumstantial discrimination" -- discrimination based upon inferences to be drawn from the inaction of the Church in a particular hire or the failure of the Church to recruit for a particular vacancy. NAACP's Findings and Conclusions at 128-44. As discussed above, inferences based upon speculation have no probative value, and are certainly inconsequential where, as here, they are rebutted by the immense quantity of evidence in the record demonstrating that race was never used as the basis for an employment or recruiting decision. See, e.g., Church Ex. 4 at 1-2; Church Ex. 1 at 8; Tr. 278-279. Indeed, it is irresponsible on this record to suggest that people of demonstrated commitment to equality such as Reverend Devantier and Dennis Stortz engaged in any sort of intentional discrimination.

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<sup>5</sup> / (...continued)

No applicant for employment at KFYO was ever denied employment because of his or her race.

17. For the reasons given in the Church's Findings and Conclusions, the discrimination issue should be decided in the Church's favor. The Bureau has reached the same conclusion, and the NAACP has presented no evidence to rebut that conclusion.

**III. KFUO DID NOT VIOLATE THE COMMISSION'S  
AFFIRMATIVE ACTION POLICIES**

18. The Bureau has contended that KFUE's EEO program was inadequate because it did not comport with King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) ("King's Garden"). Bureau's Findings and Conclusions at 48. The Bureau has also claimed that for most of the License Term, "the licensee had no plan for affirmative action"<sup>7/</sup> and that as a result, "minorities that might otherwise have qualified for positions with the stations never learned of the opportunity to apply, and, therefore, minorities were excluded from employment."<sup>8/</sup> Neither of these claims has merit.

**A. The Irrelevance of King's Garden**

19. The Bureau would like to pretend that the religious freedoms of the First Amendment are accurately defined in the twenty year old holding of King's Garden.<sup>9/</sup> Bureau's Findings

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<sup>7/</sup> Bureau's Findings and Conclusions at 50.

<sup>8/</sup> Id. at 54.

<sup>9/</sup> The NAACP's position is even more extreme. The NAACP indicates that because the FCC has in the past enforced  
(continued...)

and Conclusions at 46-48. But for all the reasons stated in paragraphs 131-145 of the Church's Findings and Conclusions, the holding of King's Garden is no longer good law: the premise on which it was based has been shattered by the U.S. Supreme Court's 1987 ruling in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"). The Bureau's failure to acknowledge this radical change in fundamental First Amendment jurisprudence is the cause of both of the Bureau's erroneous allegations that: (1) the Church did not have an adequate affirmative action plan; and (2) the Church was "less than candid" to the Commission about an affirmative action plan that included use of Church-related recruitment sources.

20. It appears to be the position of the Bureau that under the hoary rule of King's Garden, the Commission can second-guess the Church's judgments as to which of the jobs at KFYO had a

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<sup>2/</sup> (...continued)

regulations and policies designed to protect the public from being defrauded by dishonest fundraising broadcasts conducted in the name of religion, it may just as easily substitute its judgment for that of the Church regarding what is or is not important to the Church's doctrine and its dissemination thereof. NAACP's Findings and Conclusions at 151. The NAACP's Findings and Conclusions nowhere even mention the First Amendment or any of the cases interpreting the rights of a religious institution to be free of government entanglement in the exercise of its religion. Apparently the NAACP's position is that the FCC has no obligation to make accommodations to the religious mission or character of any of its licensees, contrary to even the holding of King's Garden. Instead, the NAACP seeks to falsely portray religious broadcasters as nothing more than shameless hucksters from whom the public must be protected.

religious component. That is not the case, and the Bureau's complaints that the Church has not shown to the Bureau's satisfaction why various jobs have a religious component represent the very type of governmental intrusion upon religious affairs that the U.S. Supreme Court found repugnant in Amos.<sup>10/</sup>

21. The Church made judgments in good faith concerning which positions related to KFUD's religious mission and therefore required a knowledge of Lutheran doctrine and philosophies. Church Ex. 4 at 7-9; Tr. 494-98, 500-01, 506-07, 735-36, 871-72. The Commission should not second-guess such judgments as a matter of policy, and cannot do so constitutionally. Even if the Commission were to undertake at this late date the task of deciding which particular jobs at KFUD could have appropriately had religious requirements during the License Term -- after

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<sup>10/</sup> As shown in the Church's Findings and Conclusions at 84-89, the attack on the bona fides of the religious qualifications for various positions at KFUD -- an attack launched by both the Bureau and the NAACP -- violates not only the First Amendment, but also clear congressional policy. Indeed, the strength of that congressional policy is evidenced by the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq. In that Act, Congress found that "governments shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), and legislated that an agency such as the FCC can substantially burden the free exercise of religion only if the agency can demonstrate a "compelling governmental interest," 42 U.S.C. § 2000bb-1(b)(1), and can show that the burden is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). The Bureau has not made, and cannot make, a showing that the kind of intrusion into the Church's affairs it has proposed serves any compelling interest, much less that its intrusion is carefully designed as the least restrictive means of serving some purported compelling interest.

decades of refusing to provide guidance on making such designations<sup>11/</sup> -- there would surely be no ground for refusing to renew KFUD's licenses based on these post hoc decisions. While the Church is certainly committed to abiding by any constitutionally-permissible guidelines generated by the Commission for future employment openings, it would be unfair to penalize the Church for its past good faith judgments as to the religious nature of job openings during the License Term.

22. In sum, the conclusions proposed by the Bureau and the NAACP are not just insensitive to the delicate First Amendment issues involved in the Commission's actions in this proceeding, they are oblivious to them. Focusing as they do on KFUD's supposed non-compliance with King's Garden without even making an attempt to demonstrate that King's Garden is valid and controlling, the Bureau's conclusions with regard to KFUD's EEO program lack any basis in law and should have no impact upon the result of this proceeding.

**B. The Substantiality of KFUD's EEO Program**

23. The Bureau, noting that KFUD failed to recruit outside the Lutheran family of organizations and publications for a number of hires in the earlier part of the License Term, argues that KFUD lacked an EEO program to consistently notify minorities of job openings and that qualified minorities were therefore

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<sup>11/</sup> See Church's Findings and Conclusions at 89-90.

excluded from many employment positions. Bureau's Findings and Conclusions at 54. Such a conclusion has many flaws, any one of which is fatal to the Bureau's position.

24. First, the Bureau cannot assert an unlawful absence of an EEO program merely because KFUD's EEO program often used Lutheran organizations and publications rather than the different organizations the Bureau feels should have been used. Indeed, because the Bureau has failed to even consider whether the use of outside secular recruitment sources can be constitutionally required, its conclusions regarding the appropriate reach of KFUD's EEO program are meaningless.

25. Second, lacking any such First Amendment analysis, the Bureau cannot possibly conclude that an alleged lack of recruitment outside of Lutheran entities caused minorities to be "excluded from employment" at KFUD. Bureau's Findings and Conclusions at 54. Such reasoning is entirely circular since the very question which the Bureau raises is whether the Church can utilize Lutheran training as an applicant qualification. If so, then outside recruiting would be pointless, since all qualified minorities (i.e., minorities with Lutheran training) would have already been informed of job openings through Lutheran organizations and publications. In fact, under such a scenario, the level of dissemination of job information among qualified minorities would be far higher than even the most expansive EEO program could normally achieve.

26. Third, even ignoring First Amendment considerations, the record is clear that minorities were never "excluded" from employment at KFUD, and the Bureau has been unable to present any case precedent to support its contention that a failure to use outside recruiting sources for some positions indicates exclusion of qualified minorities. At a minimum, thousands of Lutheran minorities were made aware of job openings at KFUD through Lutheran organizations and publications, and KFUD had a number of minority applicants and hires as a result. Exclusion of minorities clearly did not occur and no evidence exists to the contrary.

27. Fourth, if, as the Bureau contends, the failure to recruit for some job openings constitutes exclusion of minorities, then nearly every broadcaster whose EEO program has ever been examined by the Commission has engaged in such exclusion. The Commission has always found such omissions to reflect only a failure to recruit for each job opening -- not an exclusion of minorities. The Bureau has presented no precedent to the contrary.

28. Fifth, even disregarding all of the above, it is incontrovertible that KFUD not only had an EEO program, but that it was a substantial one. To cite only the most obvious facts, KFUD: (a) successfully exploited a network of congregations and Lutherans in the community to locate minorities (Tr. 864-65; Church Ex. 4, Att. 6, at 1; Church Ex. 7 at 9; Tr. 746-49); (b) advertised in Broadcasting Magazine and the St. Louis Post

Dispatch (Church Ex. 4, Att. 6; Church Ex. 4 at 11-12; Church Ex. 6 at 1); (c) used the Broadcast Center, the only broadcast trade school in St. Louis, which was approximately 7% minority (Church Ex. 4 at 14-15 n.5; Tr. 613-14; Church Ex. 6 at 1); (d) sent letters to at least ten local universities and personnel agencies stating that KFUD-FM encouraged minority and female applicants and seeking help in recruiting minorities and females (Tr. 188-89; Church Ex. 4, Att. 14); (e) used the Lutheran Employment Project of St. Louis (Church Ex. 4 at 15; Tr. 754); and (f) engaged in a broad self-assessment of its outreach efforts and its general compliance with the Commission's EEO requirements (Church Ex. 4 at 12; Church Ex. 4, Att. 11; Church Ex. 6 at 2; Church Ex. 7, Att. 5; Church Ex. 8 at 4). Regardless of any use of Lutheran sources for certain positions, it is incontestible that KFUD made substantial efforts to fulfill its affirmative action obligations.

29. The extensive examination of prior case precedent in the Church's Findings and Conclusions leaves no doubt that stations with EEO programs similar to KFUD's have routinely been granted full-term renewals with, at most, reporting conditions. See Church's Findings and Conclusions at 103-11. Importantly, neither the Bureau nor the NAACP presented case precedent to the contrary in their conclusions. The Bureau's draconian position with regard to KFUD is even more inexplicable when it is remembered that over the course of the License Term, KFUD hired minorities in excess of their representation in the labor force



in St. Louis. Church's Findings and Conclusions at 30. This statistic is made even more impressive by the fact that many of the job openings at KFUD were, even under King's Garden, unquestionably exempt from the Commission's EEO requirements, and KFUD's EEO program was therefore even better than its bare statistics indicate.

30. The Bureau's wildly disparate treatment of KFUD from every other licensee that has ever appeared before the Commission to defend its affirmative action program would, if adopted by the Presiding Judge, be a drastic violation of the requirement of equal treatment found in Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). The Bureau's position also brings into serious question its objectivity regarding KFUD not only as to this issue, but as to all of the issues. When the law is properly applied to the facts of this case, there is no doubt that the affirmative action issue must be resolved in the Church's favor.

#### **IV. KFUD DID NOT ENGAGE IN ANY FORM OF MISREPRESENTATION/LACK OF CANDOR**

31. The Church agrees with the Bureau that the alleged violation of Section 73.2080(b) of the Commission's Rules by KFUD is "inextricably intertwined" with the claim that KFUD misrepresented and lacked candor. Bureau's Findings and Conclusions at 62. Each allegation "has at its heart" a claim that the Church failed "to establish and maintain an affirmative action program as required by Section 73.2080(b)." Id. The